United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-1002

ORIGINAL

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No.74-1002

JOHN T. ROHE,

Plaintiff-Appellant,

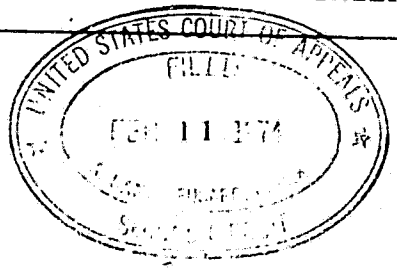
-against-

ROBERT F. FROEHLKE, SECRETARY OF THE ARMY, and COMMANDING GENERAL, FIRST UNITED STATES ARMY, FORT GEORGE MEADE, MD.,

Respondent-Appellees.

On Appeal from the United States District Court
for the Eastern District of New York

BRIEF FOR APPELLANT



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Issues Presented

The issue presented by this appeal is whether appellant was denied an effective and meaningful appeal from his call to active duty as an involuntary reservist as guaranteed him under Army Regulation 135-91(20),*/ and as guaranteed him under fundamental principles of due process of law when the National Guard, in processing his appeal, inserted in his file adverse factual statements containing new and prejudicial evidence after appellant had already filed his appeal, and which information and adverse statements were not made known to appellant and to which he was given no opportunity to rebut.

It will be argued below that appellant was denied an effective and meaningful appeal under Army Regulation and due process of law in that:

(a) the appellant did not have the opportunity to rebut the adverse statements which were added to his file after he had filed his own letter of appeal and that these statements were inserted into his file without his knowledge;

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*/ For the convenience of the Court, annexed to the Brief as an exhibit is a copy of ¶20 of AR 135-91.

(b) that the failure to afford appellant the opportunity to rebut this adverse information was a denial of the most fundamental right to due process of law and a violation of the Army's own regulations as guaranteed appellant under Gonzales v. United States, 348 U.S. 407, Crotty v. Kelly, 443 F. 2d 214 (1st Cir. 1971) and cases cited infra;

(c) that the unrebutted statements inserted in appellant's file after his appeal was in process were prejudicial to a fair consideration of appellant's case and deprived him of a just and impartial consideration of his case by the Appeal Board sitting as the ultimate judge of the facts.

Statement of the Case

John Rohe, appellant herein, was ordered to involuntary active duty, pursuant to Title 10, U.S.C. §673(a) and Army Regulation 135-91. As mandated by AR 135-91, appellant was given an opportunity to appeal his activation, which appeal was denied by a vote of three to one of the Appeal Board.

Appellant moved by order to show cause for a temporary restraining order and for preliminary and permanent injunctions and a writ of mandamus directing respondents to cancel appellant's orders for active duty. The temporary restraining order was granted on or about June 22, 1973. On or about June 27, 1973, the Honorable John R. Bartels entered an order releasing appellant from the physical custody of respondents with the proviso that appellant would receive neither pay nor credit for time served on active duty during the pendency of the stay so ordered.

Pending a hearing on the motion for a preliminary injunction, respondents moved for summary judgment. After oral argument and submission of briefs, the lower court granted respondents' motion for summary judgment and denied appellant's petition for writ of mandamus. The opinion and order of Judge Bartels, filed on December 12, 1973, is reproduced in the Joint Appendix filed herewith (A.3). Thereafter, petitioner requested

a stay of execution of the lower court's order pending appeal, which stay was granted on or about December 28, 1973, and this appeal was perfected.

The issue raised in the court below was whether or not appellant was deprived of a meaningful and effective appeal as guaranteed by AR 135-91 in that, subsequent to his filing of his letter of appeal, additional statements of facts were submitted by his unit to support their request that appellant be ordered to active duty, which statements appellant was not given the opportunity to see or rebut.

Statement of Facts

John Rohe, a New York City police officer in good standing, enlisted in the New York Army National Guard in or about November, 1967, and thus became a member of the United States Army Reserve, as well. He served satisfactorily in the Guard until June, 1971, when, as a result of illness, he was unable to attend annual active duty for training with his unit (A.24).[1] Appellant was ill on June 26, 1971, the scheduled summer camp date, and thereafter, suffering from gastroenteritis,[2] and pursuant to Police Department regulations he was forbidden to leave his home (A. 106). His illness was documented by Dr. Leonard Fox, Police Surgeon, in a letter of excuse stating that appellant was ill and confined to his home

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1 All references are to the Joint Appendix.

2 Appellant's personnel record establishes that his unit was well aware of his poor physical condition for some time, as he was frequently excused from drills by the Battalion Surgeon, Dr. Petrillo, and was, in fact, carried as excused due to illness for 19 drills, between December 1970 and June 1971 (see letter of Major Kenney, ¶2c, at A. 86, and affidavit of John Rohe, at A. 43. Apparently appellant's medical records with regard to his illness and prior excused absences are part of other National Guard files and were not produced by the United States Army in this action.

on June 26th and 27th, 1971 (A. 140). This excuse letter was later filed by appellant as an enclosure to his letter of appeal of the request to order him to active duty. Inexplicably, however, the trial court found as a fact that Rohe did not substantiate his illness by a doctor's note (A. 13), and further found as a fact, contrary to Dr. Fox's letter, that appellant was well enough to proceed to camp on June 27 (A.15).[3]

As a result of appellant's physical inability to attend summer camp, his unit commander requested that orders to involuntary active duty for a period of 18 months issue against Rohe (A. 96,102). Thereafter, in July, 1971, Rohe reported to the first scheduled drill after summer camp and tendered his physician's letter of excuse for his absence at summer camp (A. 106). This excuse was refused and Rohe was advised that he would be ordered to active duty (A. 78).

Having been orally advised by his commanding officer, appellant met with Major Curran, the Inspector General. Rohe informed Curran that he had been in poor health since in or about December, 1970, and that on June 26, 1971, and after, he was sick with gastroenteritis and on Police Department sick re-

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[3] It should be noted that there is no evidence in the record for these findings of the trial court except the statements subsequently added to Rohe's file after he had appealed.

port and forbidden to leave home (A. 45). The Inspector General subsequently filed a report with the unit commander recommending that Rohe be assigned to another unit for purposes of attending annual training rather than be ordered to active duty (A. 138). [4] The unit commander refused the Inspector General's request and refused to allow appellant to fulfill his training obligation (A.45).

In spite of Rohe's meeting with the Inspector General, the court below found as a fact that Rohe failed to meet with anyone at his unit regarding his appeal, which was not the case (A.6). The Inspector General's recommendation that appellant not be activated having been refused, he advised appellant to submit a letter of appeal pursuant to AR 135-91. Appellant did so, setting forth, inter alia, the facts of his illness and enclosing the excuse letter of Dr. Fox (A. 106).

Thereafter, in or about September, 1971, appellant was advised that his appeal would be processed along with the "comments and recommendations" of officers through the chain of command, pursuant to AR 135-91 (A. 104).

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[4] This report, like the letter of Dr. Fox attesting to Rohe's illness, was not a part of Rohe's personnel files as initially submitted to the District Court, but was, like the Fox letter, subsequently produced with the speculative assurance by respondents that these documents had been seen and considered by the Appeal Board. It is to be noted that the letter of Dr. Fox was not attached to appellant's letter of appeal, as originally submitted, but was intermingled among papers in appellant's general file.

Subsequently, appellant's case reached Lt. Colonel James Kenney, Assistant Adjutant General, New York Army National Guard, the chief legal officer to review appellant's file and to make a recommendation. Because of the insufficiency of the evidence in appellant's file, Kenney returned the file to Rohe's unit three times with a request for additional information (A.75,82,86). At the time these requests for additional information were made, Rohe had, of course, already filed his appeal, and was not given notice of any kind that any additional information was requested or submitted. Kenney's requests for additional information, particularly the latter request (A. 86), make it clear that Kenney was troubled by the fact that Rohe had obviously been known to be in poor health by his unit, and if he was ill at the time of camp, should not be activated for 18 months. It should also be noted that Kenney specifically requested verification of Rohe's illness from the Police Department, thus suggesting that Kenney may have overlooked Dr. Fox's letter. [5]

Thereafter, in response to Lt. Colonel Kenney's requests, additional information was indeed submitted by appellant's unit for review, ultimately, by the Appeal Board. The information so submitted was not "comments and recommendations", as authorized by AR 135-91, but was allegations of fact in support of

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[5] This becomes even more crucial when it is noted that Captain Sibon's letter of the Police Department (A. 70), submitted in answer to Kenney's request, conflicts with Dr. Fox's letter, to the prejudice of appellant. See infra, p. 9.

the unit's request that orders issue. Appellant was never advised that new facts were to be added to his file. While appellant might have anticipated that his commanding officers would file adverse comments and recommendations that he be ordered to active duty, he could not anticipate the introduction of new, adverse facts which he would have rebutted if given the opportunity. [6]

The statements submitted by Rohe's unit after he had filed his appeal consisted of allegations by his Sergeant and Battalion Surgeon that at the last drill prior to summer camp Rohe asked to be excused from duty because of a hospital appointment for an examination of his physical condition, but later admitted he was not sick, his appointment was at a clinic and he flushed his appointment card down the toilet (A. 68, 69). Had Rohe seen these statements he would have rebutted them by setting forth the information which refuted them, as he did in his affidavit (A.41), the first opportunity he had to see and respond to these erroneous factual allegations.

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6 Respondents submitted an affidavit of William M. Toohey (A.49), in which he swore that he would have furnished appellant with any document in his military file, provided that Rohe could describe the documents he wished to see with particularity. Mr. Toohey's assurance is of little moment to appellant who clearly could not describe with any particularity papers which he never knew, nor could have suspected, even existed.

It is clear from reading appellant's letter of appeal (A. 106) that he did not deal with the events of his last meeting prior to summer camp, in his appeal. The facts of that drill were, in fact, irrelevant to the fact that four days later Rohe awoke with gastric pain in the early morning hours and was put on Police Department sick report (A. 106, 140, 70). It was only after Rohe filed his appeal, probative only of his actual illness at the time of summer camp, that his unit submitted statements raising the events of the prior drill meeting as an issue of Rohe's credibility.

The court below, in granting the motion for summary judgment, found as facts that all the statements submitted by the unit after appellant had appealed, to support the request for active duty orders, were true (A. 3, et seq.), notwithstanding appellant's affidavit of rebuttal (A. 41), which denied those allegations.

The other statements submitted were from the company clerk as to his telephone conversation with Rohe (A. 71), which omitted the facts that appellant telephoned his unit and explained his illness and his inability to leave home due to Police Department regulations (A. 45), and from the unit commander referring to the statements of the Surgeon and the Sergeant (A. 78-9, 89-90). Appellant's affidavit, filed after he first learned of these charges, indicates how he would rebut these allegations

by referring to his medical history with the unit and his recurring physical difficulties resulting from his gastric condition (A. 43,86). In addition, the statement of Captain Sibon, Police Department, (A. 70), was also submitted after Rohe filed his appeal.

Sibon's statement, clearly factual like the others and not a "comment" by an Army officer in the chain of command, directly contradicted Dr. Fox's statement as to appellant's sick status (A. 70, 140). Fox stated that Rohe was confined at home on June 26 and 27, while Sibon stated that Fox returned Rohe to duty effective 8:00 a.m. on June 27. Had Rohe seen Sibon's letter he would certainly have rebutted it and clarified the inconsistencies in these reports. As his sworn statement indicates, his return to duty was a bookkeeping record, only (A. 44). He did not, in fact, return to work until June 30, his next duty assignment.

Thus all the statements submitted by the unit in an effort to provide sufficient information to activate appellant contained allegations of fact and, implicitly, allegations that Rohe had lied about his illness and was a mere malingerer. These documents were in fact the sole factual evidence presented by the Guard to the Appeal Board to justify appellant's call to active duty.[8]

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[8] That these subsequent statements were the sole basis of this finding is evident from appellant's personnel file which, at the time he filed his appeal, contained nothing relevant to this incident but morning reports and the copy of the notice sent to him advising him of the absences and the request orders.

Upon consideration of the evidence submitted by the Guard after appellant filed his letter of appeal and the letter itself, the Appeal Board found, by a vote of three to one (A. 116-17) that:

> "c. The petitioner's appeal is directed toward justifying why he knowingly and wilfully violated specific guidance concerning his unsatisfactory attendance. His stated extenuation was viewed as unsupported and unacceptable grounds for favorable consideration by this Board."

This conclusion of the Board makes it apparent that its finding rests on the statements of facts submitted after appellant filed his letter of appeal. There is no evidence of any kind in appellant's military file (A. 61, et seq.), other than the subsequently submitted statements, which could support a finding that Rohe acted wilfully and knowingly. On the contrary, his unit medical history and the letter of Dr. Fox in support of appellant's letter of appeal, support the view of the dissenting voter on the Board that Rohe's appeal should be favorably considered (A. 118).

Further, the unrebutted statement by the Battalion Surgeon, Petrillo, Sgt. Santagata, Sp. Green, Captain Sibon and Lt. DiTullio were also the very basis of the District Court's decision against appellant. The court found that appellant was not too sick to report on June 27, 1971 (A. 15) and that:

"The essence of the charge against Rohe was that in spite of the recommendation to him by the Battalion Surgeon after an interview on June 26, 1971, that he was not too sick to be excused from initial attendance at the summer camp, he nevertheless refused to proceed to camp." (A. 13-14) [9]

These findings of the court below are based on the subsequently submitted statements and refer to matters raised only by the National Guard and never answered or even mentioned by Rohe in his letter of appeal. See A.106-7.

Following the decision by the Appeal Board, appellant's active duty orders were amended to require his reporting for active duty on April 17, 1972. Appellant failed to report on the scheduled date. This action was commenced after appellant was returned to military control.

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[9] The court below erroneously referred to this interview as occurring on June 26, 1971, the first day of summer camp. In fact, the meeting was on June 22, 1971 and is more fully described in appellant's affidavit at A. 43.

Statement of Law

POINT I

APPELLANT WAS DENIED AN EFFECTIVE AND MEANINGFUL APPEAL OF HIS ORDERS FOR ACTIVE DUTY IN THAT THE ARMY FAILED TO ABIDE BY THE CLEAR MEANING AND INTENT OF ITS OWN REGULATION 135-91(20) AND THE MOST FUNDAMENTAL REQUIREMENTS OF DUE PROCESS OF LAW

A. Appellant Did Not Have the Opportunity to Rebut Several Adverse Statements Which Were Added to His File After His Appeal Was in Process

The issue presented by this appeal is whether the appellant was denied an effective and meaningful appeal as guaranteed him under Army Regulation 135-91, ¶¶16 and 20, and pursuant to the most fundamental requirements of due process of law. It is submitted that the failure to apprise appellant of the addition to his file of several adverse factual statements after his appeal was filed prevented him from rebutting these adverse statements and thus precluded him from obtaining fair and impartial consideration by the Army Appeal Board responsible for determining the issues presented. In so doing, appellant's rights were violated and his orders to active duty as an involuntary reservist should be set aside and the matter remanded to the United States Army for proper consideration.

The essence of appellant's claim is that his right of appeal was made a nullity by the subsequent insertion in the file of facts and statements by his superiors which were untrue, prejudicial and unknown to appellant. The question raised by this case is not that the regulations are unconstitutional but, rather, that the regulations were unfairly and inappropriately implemented in the case at bar, thereby violating the meaning and intent of the regulations and otherwise depriving appellant of due process of law. Simply put, it is appellant's position that a right of appeal as granted by the Army under ¶20, AR 135-91 has, concommitant with it, the right and opportunity to rebut and answer serious allegations of fact made against him and which allegations constituted almost the sole record upon which the Appeal Board was to make its decision.

Appellant's claim revolves around the statements of Battalion Surgeon Petrilla (A. 68), Sergeant Santagata (A.69), Sp. Green (A. 71), Police Captain Sibon (A. 70) and Lt. DiTullio (A. 78-9), which statements were added to the file long after appellant had already filed his letter of appeal (A. 66). As the record reflects, these statements were added as a direct result of the request of Lt. Colonel Kenney on behalf of the New York Army National Guard who returned the file for further documentation on three occasions (A. 75,82,86). Colonel Kenney made clear in his return of the file to the unit that the record

was insufficient to order appellant to active duty and that further documentation as to appellant's status and history with the unit was necessary to make a "proper determination and recommendation in the case" (A. 86). As a result, appellant's unit meticulously went about its task of obtaining statements and documentation to justify its ordering appellant to active duty. Appellant not only never saw these statements but was unaware that they had been added to his file and thus could not rebut them.

B. The Failure to Afford Appellant the Opportunity to Rebut the Adverse Information Added to His File Denied Him an Effective Appeal Under Army Regulations 135-91(20) and as Guaranteed by the Barest Requirements of Due Process of Law.

The facts of this case fit squarely within the rationale and mandate of Crotty v. Kelly, 443 F. 2d 214 (1st Cir. 1971). The defective procedure in that case which resulted in a denial of a meaningful and effective appeal is comparable to the case at bar. As in Crotty, the final determination here is made by an Appeal Board whose decision is final. Further, this Appeal Board is the only decision-making body which passes on the entire file and renders a final decision. Finally, as the Crotty court notes, the appellant could not effectively present his position to the Board without knowing the content of the reports and recommendations made against him. The denial of this right to present one's case effectively violated due process of law.

The teachings of Crotty are not without precedent in this Circuit, nor, as the Crotty case indicates, the Supreme Court. This Court in United States v. Purvis, 403 F.2d 555 (2d Cir. 1968), noted that a denial of the opportunity to correct misinformation in the record before a Board which does not permit personal appearances but makes its determination on the written record, constitutes a serious and fundamental denial of due process of law. In fact, the basic issue presented by the case at bar is best defined by the Supreme Court in Gonzales v. United States, 348 U.S. 407, where it was stated:

> "Just as the right to a hearing means the right to a meaningful hearing ... so the right to file a statement before the Appeal Board includes the right to file a meaningful statement, one based on all the facts in the file and made with awareness of the recommendations and arguments to be countered."
>
> [at p. 415]

The doctrine of Crotty in its application to the case at bar may be best shown by the decision of a Pennsylvania District Court in Violi v. Reese, 343 F. Supp. 462 (E.D. Pa., 1972). There the adverse statements introduced, unknown to the petitioner, dealt with issues of fact alleged by the military to be true relating to Violi's motivation for filing as a conscientious objector. The Court stated:

> "It is obvious therefore that fundamental notions of due process require that petitioner first know of this adverse evidence, and secondly, that he be given an opportunity to reply thereto."
>
> [at p. 467]

In fact, the cases that establish the right of fair reply in military or Selective Service cases are numerous. See United States v. Cabbage, 430 F. 2d 1037 (6th Cir. 1970); United States v. Cummins, 425 F. 2d 646 (8th Cir. 1970); United States v. Owen, 415 F. 2d 383 (8th Cir. 1969); United States v. Thompson, 431 F. 2d 1265 (3rd Cir. 1970); Wiener v. Local Board 302 F. Supp. 266 (D. Del. 1969); Murray v. Blatchford, 307 F. Supp. 1038 (D. R.I. 1969); Finley v. Drew, 337 F. Supp. 76 (E.D. Pa. 1972); and Nevarez Bengoechea v. Micheli, 295 F. Supp. 257 (D. Puerto Rico 1969). In each of these cases, although dealing with a variety of adverse statements, the courts specifically noted that it was a denial of due process to permit an Appeal Board to review a case containing the adverse statements, which statements were unknown to the individual appealing and which he had no opportunity to rebut.

The District Court in the case at bar rejects this long line of cases on the grounds that these cases, while military in nature, involve either subsequent criminal prosecution or conscientious objector questions and therefore do not apply to the case at bar. Such a position, however, disregards the similarity of procedure present in all the cases. The Appeal Board procedure in the case at bar is almost identical

to that used in conscientious objector applications. In both cases, it is intended by the Army that there be a procedure of appeal through a chain of command with the opportunity for the individual to present statements in support of his position and to be ultimately determined by the board reviewing the written record, only. The question, therefore, is whether this appeal is to be a meaningful one or merely a spurious adherence to form. While this case is of first impression in applying the doctrine of Crotty to an involuntary call-up of a reservist, the rationale behind appellant's position is not without firm support. This Court, in Smith v. Resor, 406 F.2d 141 (2d Cir. 1969), recognized that there is an appeal procedure that should be followed so as to permit a reservist being called to active duty the right to present his case. The Court in Smith remanded the case to the Army because petitioner was "effectively foreclosed from obtaining review." Other cases dealing with reservists have also recognized that the Army must adhere to its procedure and where it provides for a right, insure that the right is meaningful in its application. Thus, in Antonuk v. United States, 445 F. 2d 592 (6th Cir. 1971), the court noted:

> "... while there may be superficial compliance with form, the substance of rights guaranteed by military regulation might be effectively denied."
>
> [at p. 596]

In Ansted v. Resor, 437 F. 2d 1020 (7th Cir. 1971), the court noted that the call-up regulations were proper since the reservist had the right to present "appropriate evidence" in his behalf. Cf. Baugh v. Bennett, 329 F. Supp. 20 (D. Idaho, 1971) where the court stated, in an involuntary call-up of a reservist:

> "In order for the Appeal Board to effectively carry out its stated function: 'to weigh all information, facts, circumstances and documentation incidental to the processing of an individual for involuntary active duty' it would seem that these contentions of the individual would be vitally important. Without his side of the story, his appeal process was a sham."
>
> [at p. 24]

The recognition of appeal, the right to present appropriate evidence and the requirement of substance as well as form in implementing a regulation are the same criteria that were the root of Crotty and the above-cited cases. If an appeal procedure is set up, then obviously it must be implemented in such a manner as to provide for an effective and meaningful appeal.

The thrust of appellant's argument is that where a procedure is provided and clearly intends to afford certain fundamental aspects of due process of law, then that procedure must be adhered to in substance as well as form. Appellant does not seek to rewrite Army regulations to provide some new

and broad-ranging standard of review. Rather, he only seeks fairness within the very procedure set up by the Army. See Smith v. Resor, supra, and United States ex rel Sledjeski v. Commanding Officer, 478 F. 2d 1147 (2d Cir. 1973). Paragraph 20 of AR 135-91 contemplated that a reservist would be advised of the reasons for his being called to active duty, the right to file an appeal therefrom based upon a complete record, and that thereafter the case would be submitted through the chain of command with appropriate recommendations from each person reviewing the case until it reached the Appeal Board. Nowhere does this appeal procedure provide for the return of the documentation in midstream to add further facts and information in support of the call to active duty without any notice to the aggrieved individual who is the subject of the call-up. It would seem, on its face, that where an appeal is returned to the unit level for further information, that even the Army's concept of due process as envisioned by its regulations would mean the opportunity for the individual involved to up-date his appeal to reflect the recent additions to the file.

In view of the procedure used by the Army in processing this case, the repeated return of the file for additional information, the doctrine of Gonzales, Crotty and the cases cited above are of obvious relevance. Appellant's enlisted status in the New York Army National Guard does not change

the distortion of the appeal procedure in appellant's case.[10] Appellant only seeks the opportunity to rebut new and additional statements added to his file so that his appeal would be a meaningful and effective one as required by the regulation and law.

C. The Unrebutted Statements Submitted Were Prejudicial to Consideration of Appellant's Case by the Appeal Board and Had a Material Impact in the Ultimate Decision

The statements at issue were severely prejudicial to consideration of appellant's case and adversely affected the ultimate decision by the Appeal Board. The statements were not harmless or merely cumulative of evidence already in the file. Nor were they comments and recommendations under ¶20 AR 135-91 to which no response is required. These statements were, in fact, the very crux of the case against appellant. The critical importance of these statements to the ultimate decision rendered by the Appeal Board can best be seen by how the statements came about and their ultimate impact upon the reviewing authorities and the District Court. As noted in the

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[10] The District Court in its opinion placed great emphasis on the fact that appellant was an enlistee and not an inductee (A. 16). However, the question involved is not what appellant's status was, but, rather, it is what procedures are called for and how they are implemented. The regulation provides for an appeal with review by an Appeal Board. The only relevant question is whether the procedure provided for was adhered to and was appellant afforded the rights to which he is entitled?

Statement of Facts, appellant's file was returned on three occasions so that National Guard Headquarters could make a proper recommendation. It was only after the statements at issue were made a part of the file that the National Guard found sufficient information present to recommend that appellant be called to active duty. Thus the allegations of the Battalion Surgeon (A. 68) and Sgt. Santagata (A. 69) with regard to events of June 22nd, the statement by Sp. Green as to a phone call he had with appellant (A. 71), the conflicting statements of the Police Department between Captain Sibon (A. 70) and the Police Surgeon, Dr. Fox (A. 140) and the characterization of appellant by his commanding officer, Lt. DiTullio (A. 78-9), became the critical evidence considered by the National Guard. Without these statements, Colonel Kenney, at Headquarters, found the file insufficient to make a recommendation (A. 86). With these statements, he was able to recommend appellant's call to active duty.

A review of the District Court's opinion also clearly indicates the critical importance of the statements at issue. A review of the District Court's findings of fact on the motion for summary judgment indicates that Judge Bartels took as factually correct the events leading up to appellant's call to active duty as set forth in the statements added to his file. The court, in fact, places great reliance on appellant's conversa-

tion with the Battalion Surgeon on the last drill prior to summer camp and characterizes it as the "essence of the charge" against appellant (See A.13). The court cites Captain Sibon's comments as determinative of the time period when appellant was on sick report (See Court's Opinion, A. 15).

It would appear from the District Court's opinion that the factual circumstances outlined by the Battalion Surgeon and the other statements added to the file after appellant had filed his own letter of appeal were critical to the determination that appellant was properly called to active duty. Thus their importance speaks for itself. Yet on the other hand, in order to dismiss appellant's argument that he should have had an opportunity to rebut these prejudicial statements, the court goes on to hold that they had "but a slight cumulative effect not sufficiently important to be harmful" (A. 17). It is submitted that the District Court cannot have it both ways. These statements cannot, on the one hand, be the major thrust against appellant at both National Guard Hq. and the District Court, yet on the other hand, be insignificant.

If the statements had an important impact on the District Court and the National Guard, then certainly they must have had an equally important impact on the Appeal Board's determination. Yet appellant had no opportunity to rebut them. Appellant's letter of appeal was based solely on the events of June 26th, the day he was to report for summer camp (A.106).

He did not deal with the events of June 22nd, nor his prior sick record history because he did not know that those facts would be at issue. Nor did he seek to clarify the time period when Dr. Fox put him on sick report, for he did not know that the Police Department would be submitting a statement which was erroneous and seemed to indicate that appellant was out only for June 26th and could have reported back to duty on the morning of June 27th. As appellant indicates in his affidavit filed in the District Court, he could have and would have rebutted each of these statements in a meaningful way had he known of their existence (A. 41, et seq.). Certainly the comments by the Battalion Surgeon and Sgt. Santagata that appellant was not sick and flushed documents down the toilet mandated that appellant have the opportunity to rebut such prejudicial allegations. These statements are no less significant than the adverse comments found in cases such as Violi v. Reese, supra, and the numerous cases previously cited.

It is thus submitted that appellant was seriously prejudiced by the inclusion of these statements after his appeal was filed. By preventing him from rebutting them, the Appeal Board received a distorted record, thus denying appellant a fair and meaningful appeal as contemplated by the regulations. It must be emphasized that this failure to have the opportunity to rebut was more than a mere "procedural irregularity" that

was of little moment. See Nurnberg v. Froehlke, (slip opinion for the 2d Circuit, Docket No. 73-1538, dec. December 28, 1973). The report referred to by the court in Nurnberg was only a recommendation which contained a minor reference to facts outside the record. Obviously the Locke report in Nurnberg and the additions in appellant's case are not comparable. Unlike Nurnberg, appellant was prevented from obtaining a full and fair opportunity to present the merits of his claim since he could not know of the adverse allegations against him. The procedures did not, therefore, meet "appropriate standards of fairness", as noted in Nurnberg, supra, at p. 9, slip opinion.

The District Court also seems to categorize these additional statements in appellant's case as being within the scope of comments and recommendations as provided by the regulations (A..10). See Caruso v. Toothaker, 331 F. Supp. 294 (M.D. Pa. 1971). Admittedly a comment or recommendation need not necessarily be available for rebuttal. See Nurnberg, supra, and Caruso, supra, but the statements added to appellant's file go far beyond any comment or recommendation and constitute factual evidence to be used against appellant in consideration of his case. The Battalion Surgeon, Petrilla, Sgt. Santagata, Sp. Green and the Police Department are not authorized by regulation to make comments and recommendations. Further, the comment by Lt. DiTullio,relying on this new evidence, goes far beyond what was intended by the regulation. These statements

constituted new evidence that should have resulted in appellant being advised that his file was being augmented, with the opportunity to reply thereto. The distinction between the statements filed in the case at bar and a comment and recommendation can best be exemplified by comparing the statements in this case with that which was found permissible in Caruso v. Toothaker, supra. Obviously a recommendation in favor or against is far different than factual statements and documentation added by third parties.

In considering the prejudice of these statements, one other point should be dealt with and that is the District Court's reliance on an affidavit by a Major Toohey (A. 49), indicating that appellant could have obtained the records at the Appeal Board had he so requested. (See Fn. 3 of the District Court's Opinion, at A. 21). It is obvious that appellant is not in a position to request that which he does not know exists. Major Toohey blithely states in his affidavit that appellant would be given copies of documents if he would identify them, but how could appellant identify them if he did not know they existed? If appellant was entitled to see the documents, then it was the obligation of the Army and National Guard to advise him of their existence. Appellant should not be forced to go on a fishing expedition after he has filed his appeal and considers the record complete.

It is thus submitted that a review of the case law and the type of information that was added to appellant's file mandates that he be given an opportunity to rebut this evidence in order to obtain an effective and meaningful appeal as contemplated by the regulations. While it may ultimately be determined that appellant, although sick, should still have reported to his unit at some later time during summer camp, that is an issue solely for the Appeal Board to consider on a fair and complete record. Even in its present state, there was one dissent at the Appeal Board and it is impossible to speculate that appellant would not have been vindicated by the Appeal Board had he had a fair and complete opportunity to reply to all the evidence against him. If appellant's credibility is at issue, then at the very least he should be given the opportunity to set forth his side of the case on all the facts at issue. Only then can a just and impartial determination be rendered.

Conclusion

For all the foregoing reasons, the Court should reverse and set aside the decision and order of the District Court and remand this case to the United States Army for proper processing and review in conformity with the Army's own regulations.

Respectfully submitted,

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STEVEN J. HYMAN,
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Law Clerk
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ter, through Chief, National Guard Bureau, Department of the Army, Washington, DC 20310.

(2) *USAR personnel.* Applications initiated by USAR members will be submitted as follows:

★(*a*) A member of a USAR unit will submit his application to his unit commander who will immediately forward it, together with his recommendations and the member's records, to the appropriate area commander or to the CG, USAAC for USAR Augmentation. Applications requiring Department of the Army approval will, in turn, be forwarded to the Commanding Officer, U.S. Army Reserve Components Personnel Center, Department of the Army, Fort Benjamin Harrison, IN 46249.

★(*b*) A nonunit member will submit his request to CINCUSAREUR, CINCUSARPAC or CG, USAAC, as appropriate. Applications requiring Department of the Army approval will, in turn, be forwarded, together with the member's records, to Commanding Officer, U.S. Army Reserve Components Personnel Center, Department of the Army, Fort Benjamin Harrison, IN 46249.

★*f. Orders.* Orders directing discharge will be issued as prescribed in AR 310-10 or NGR 310-4 citing the appropriate paragraph in AR 135-178 or NGR 635-200 and this regulation as authority.

g. Type of discharge. Enlisted members discharged for the reasons set forth in this regulation will be discharged under honorable conditions and the appropriate local Selective Service Board will be proinptly notified of discharge action and the reason for discharge using DD Form 44 (Record of Military Status of Registrant).

19. Authority to discharge. *a.* Authority to approve discharge is assigned as follows:

★(1) State adjutants general, area commanders, and Commanding General, USAAC, are authorized to take final action on applications for discharge of enlisted members based on dependency or hardship.

(2) Headquarters, Department of the Army, will take final action on applications for discharge from enlisted members based upon religious or national health, safety, and interest reasons.

b. The approving authority will—

(1) Consider carefully the facts upon which the request is based.

(2) Procure any additional information that may be necessary to determine the validity of the request.

(3) Take final action to approve or disapprove the application.

c. In those instances where the circumstances for discharge for hardship reasons do not warrant approval, the commander may, if considered appropriate, approve delay from entry on active duty as authorized in paragraph 16.

20. Appeals. *a. General.* An individual who has been denied a requested discharge or delay in order to active duty may appeal such denial. The appeal will be submitted within 15 days of the member's receipt of a denial; it will explain those facts pertinent to his case which he feels were not fully considered, and may include any additional appropriate evidence which the applicant may wish to present.

★(1) In those instances where the reporting date shown in active duty orders does not permit sufficient time to allow the member to submit an appeal and for a final decision to be furnished, orders may be amended to reflect a later reporting date or orders may be revoked and new orders published when availability date is determined.

★(2) Action to amend or revoke active duty orders as set forth in (1) above should not be construed as an act of granting formal delay in entry on active duty as authorized in paragraph 16*c*. Paragraph 16*d* is not applicable to members whose active duty orders have been amended or revoked to permit processing of an appeal request.

b. How submitted. Requests for appeals will be submitted through the unit commander to the commander having authority to approve discharges or delays as prescribed in paragraphs 16*a* and 19*a* as appropriate.

c. Authority to act on appeals. The approving authority may act on such appeals when the decisions are favorable to the individual concerned. When denial of an appeal is indicated, however, he will forward the request and pertinent records, together with his recommendations, to Headquarters, Department of the Army for final determination as follows:

(1) *Denial of appeal for discharge.*

(*a*) State adjutants general will forward denial of appeals for discharge to the Chief, Office

¶20, Army Regulation 135-91

of Reserve Components, through Chief, National Guard Bureau, Department of the Army, Washington, DC 20310.

★(*b*) Agencies of Headquarters, Department of the Army, area commanders and CG, USAAC, will forward denial of appeals for discharge to Chief, Office of Reserve Components, through Chief, Army Reserve, Department of the Army, Washington, DC 20310.

(2) *Denial of appeal for delay.*

(*a*) State adjutants general will forward denial of appeals for delay to the Commanding Officer, U.S. Army Reserve Components Personnel Center, Fort Benjamin Harrison, IN 46249, through Chief, National Guard Bureau, Department of the Army, Washington, DC 20310 for processing under AR 601-25.

★(*b*) Area commanders and CG, USAAC, will forward denial of appeals for delay to the Commanding Officer, U.S. Army Reserve Components Personnel Center, Fort Benjamin Harrison, IN 46249 for processing under AR 601-25.

d. Appeal of involuntary order to active duty. If an individual appeals his involuntary order to active duty for reasons other than those specified in this regulation, the denial of such appeal will be forwarded to CO, USARCPC in accordance with *c*(2)(*a*) or (*b*) above as appropriate. The member's DA Form 201 (Military Personnel Records Jacket, U.S. Army) will be forwarded in all appeal cases.

★*e. Appeal board.* The Commanding Officer, U.S. Army Reserve Components Personnel Center, will convene an appeal board to determine findings and submit recommendations to him on denials of appeal of involuntary order to active duty submitted under this regulation. The board proceedings will be as prescribed by the Commanding Officer, U.S. Army Reserve Components Personnel Center. The provisions of AR 15-6 will not be applicable to such proceedings.

21. Members who desire to become temporary full-time missionaries or who incur a temporary nonmilitary obligation requiring oversea residency. *a. General.* Enlisted members who have completed their initial ADT may be authorized to fulfill a temporary missionary obligation provided they furnish certification of the religious obligation made by the recognized church body concerned. Other enlisted members who have completed their initial ADT may, upon their request, be authorized to fulfill a bona fide, temporary, nonmilitary obligation requiring oversea residency, where no Reserve component unit vacancies are available, and which would conflict with their required participation in Reserve training provided they furnish certification of the obligation from the employer or sponsor. In the event the request is approved, the member concerned (including missionaries) will be required to sign a new enlistment agreement under terms which will insure that he completes the amount of Ready Reserve service which was required under his original enlistment.

b. Period of time authorized. Enlisted members may be authorized the period of time required to fulfill their missionary and/or nonmilitary oversea obligation, but not to exceed 2 years, 6 months.

c. Approval authority.

(1) Final approval of applications, except those from members having a missionary obligation, will be made by the CO, USARCPC. Applications of ARNG personnel will be forwarded by the appropriate State adjutant general to the CO, USARCPC, through the Chief, National Guard Bureau. Applications of Army Reserve personnel will be forwarded by the appropriate area commander to the CO, USARCPC.

(2) Applications from members who incur a temporary missionary obligation will be approved by the appropriate State adjutant general for members of the ARNG, or by the appropriate area commander for members of the USAR.

d. ARNG members. The following will apply when ARNG members are authorized to fulfill a temporary missionary and/or temporary, nonmilitary oversea obligation:

(1) The member will be reenlisted in the ARNG for the number of years remaining on his original 6-year Ready Reserve obligation, plus 2 years, 6 months which is the maximum number of years authorized for assignment to the Inactive Army National Guard, under the provisions of 10 USC 511(a), prior to his departure on his missionary/nonmilitary oversea obligation.

Example: Member's original enlistment required a total of 6 years Ready Reserve service. On date of reenlistment the member had completed

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Firm Hon. Edward John Boyd, V

By Ellen Worrell